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RECUSATION OF FEDERAL JUDGES

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CHANGE OF VENUE DISTINGUISHED

RECUSATION refers to disqualification of a judge and is to be sharply distinguished from change of venue which as to criminal cases is governed by Rules 20 through 22 of the Federal Rules of Criminal Procedure.

> It is a misuse of terms to say that the venue is changed when the trial is had in the court where the suit was brought and some other than the regular judge is called in to preside on the trial, in the very court in which the record has all the while remained.[1]

DE FACTO JUDGE DISTINGUISHED

The actions of a de facto judge, so far as they affect third persons, are not open to question.[2]

THE COMMON LAW RULE

At common law the major causes for disqualification of a judge were "substantial or direct interest in the event of the litigation, or close ties of blood or affinity. . . ."[3] Similarly, a judge who had been of counsel was disqualified from sitting. In the absence of these conditions,

> the presumption of the rectitude of the judge in the discharge of his duties in all other situations was indisputable; and hence the objection to a judge for any other than the causes named was unknown to the federal jurisprudence until the enactment of the Judicial Code.[4]

It has been stated that: "The common law of disqualification, unlike the civil law, was clear and simple; a judge was disqualified for direct pecuniary interest and for nothing else,"[5] and further that: "No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely."[6]

The Statute on Interest of Judge

Since 1792[7] there has been a statute permitting disqualification, upon application by a party, on four separate grounds: (1) interest; (2) previous rep-

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1. *Ex parte* N.K. Fairbank Co., 194 F. 978, 998 (M.D. Ala. 1912).
2. Ball v. United States, 140 U.S. 118 (1891); McDowell v. United States, 159 U.S. 596, 601 (1895); Luhrig Collieries Co. v. Interstate Coal & Dock Co., 287 F. 711, 713 (2d Cir. 1923).
3. *Ex parte* N.K. Fairbank Co., 194 F. 978, 986 (M.D. Ala. 1912).
4. *Id.* at 987-88.
5. Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 609 (1947).
6. *Id.* at 612.
7. 1 Stat. 278 (1792).

resentation of a party; (3) prospective participation in the case as a material witness; and (4) relationship or connection with a party.

This statute was replaced in 1948 with the provision that:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[8]

While the former statute on disqualification for interest called for an application by either party to the litigation, the present statute does not.[9] The clear intent of this change is that, in the proper case, the judge should disqualify himself on his own initiative. Nevertheless, it has been held that there may be a waiver by failing to object in the trial court.[10] Yet the Judicial Conference has resisted contemporary proposals to place the matter in the hands of parties or counsel.[11]

Interest

The statute requiring any judge to disqualify himself in any case in which he has a "substantial interest" normally contemplates pecuniary or beneficial interest,[12] and does not apply in the absence of a showing or a specific charge that the judge has such an interest.

Substantial beneficial interest has been held to exist where the judge was a depositor in the bank from which the defendant allegedly embezzled funds[13] and also where the judge was a stockholder in a corporation being sued by the United States government.[14]

Of Counsel

The United States Supreme Court has held that the fact that a judge has formerly been of counsel for one of the parties in a different cause does not prejudice his sitting in the case.[15] Thus the disqualification is apparently limited

8. 28 U.S.C. § 455 (1948).
9. Adams v. United States, 302 F.2d 307, 313 (5th Cir. 1962).
10. *Id.* at 309.
11. Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts 68-69 (1961).
12. United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965).
13. *Ex parte* Cornwell, 144 Ala. 497, 39 So. 354 (1905); Note, 6 Colum. L. Rev. 279 (1906).
14. *In re* Honolulu Consol. Oil. Co., 243 F. 348, 353 (9th Cir. 1917). *See also* Long Beach Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 189 F. Supp. 589, 610 (S.D. Cal. 1960).
15. The Richmond, 9 F. 863 (C.C.E.D. La. 1881). *See also* Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1858); Duncan v. Atlantic Coast Line R.R., 223 F. 446 (S.D. Ga. 1915). *See also* Carr v. Fife, 156 U.S. 494, 498 (1895), where the Supreme Court enunciated a similar view.

to those situations where the judge had been of counsel during a pending case.

Accordingly, the mere fact that a judge in a patent case formerly had a client who is a party in the litigation does not disqualify the judge.[16] Likewise, the fact that the judge had represented relatives of the codefendant in certain legal matters until shortly before becoming a judge does not show good cause for recusation.[17]

However, where the judge has been of counsel during the pending case, he should disqualify himself as did the judge who regarded himself as disqualified by reason of official knowledge obtained during the time that he was an assistant United States Attorney.[18]

If a judge fails to disqualify himself in such circumstances an appellate court will often do it for him. Thus, a district judge who was United States Attorney when the defendant was tried and convicted was held disqualified to act on the defendant's motion to vacate judgment.[19] This rationale has been extended to a situation where the defendant pleaded guilty, and the United States Attorney prior to his appointment as a judge merely signed the information and moved for arraignment and sentence.[20]

However, the rule is limited to situations where the facts and issues of the pending case are identical to those in the previous case where the judge had been of counsel. Thus, it has been held that a judge is not disqualified because of his prior prosecution, while United States Attorney, of a defendant for an offense involving the interstate transportation of stolen motor vehicles[21] since different vehicles were involved in the second prosecution. If the same vehicles had been involved in both cases there might be disqualification.

Also relevant is whether the judge in his "of counsel" capacity acquired any knowledge of the case. For example, the court of appeals has held that the fact that the judge had been United States Attorney while his office was prosecuting the case out of which the present perjury prosecution arose did not disqualify him to preside over the perjury prosecution, where he had no prior connection with the defendants, and defendant's counsel with full knowledge of the facts raised no objection.[22]

Judge as Witness

In general, the presiding judge may not testify as a witness to a material

16. Durlington v. Studebaker Packard Corp., 261 F.2d 903, 906 (7th Cir. 1959).
17. Simmons v. United States, 89 F.2d 591, 592 (10th Cir.), *cert. denied,* 302 U.S. 700 (1937).
18. United States v. Fricke, 261 F. 541, 543, 545 (S.D.N.Y. 1919).
19. United States v. Vasilick, 160 F.2d 631 (3d Cir. 1947).
20. United States v. Maher, 88 F. Supp. 1007 (D. Me. 1950).
21. Roberson v. United States, 249 F.2d 737, 741 (5th Cir. 1957), *cert. denied,* 356 U.S. 919 (1958).
22. Adams v. United States, 302 F.2d 307 (5th Cir. 1962). *See also* Cagson v. Hass Purder, 253 F. Supp. 744, 748 (M.D. Fla. 1966).

fact, and to do so constitutes prejudicial error.[23] The rationale of this rule was aptly stated in a concurring opinion in *Lepper v. United States*:[24]

> Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and witness are incompatible. If he testified he would have to pass upon the competency of his own testimony; and as a witness he might be regarded as partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair advantage by admitting the presiding judge as a witness is very obvious.[25]

The danger of prejudice to the defendant is also clear and has been stated by the Supreme Court:

> The result would be that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of a trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant.[26]

Thus, where, during the trial, the judge interrogates a witness, he should be careful not to turn his interrogation into testimony. The court of appeals has reversed a conviction, where the judge under the guise of asking questions of the defendant as to an interview with the judge in net effect testified as to that interview, in which the defendant had intimated his guilt.[27]

Disqualification of a judge on the ground that he was a material witness is confined to situations where the party could have found an adequate substitute.[28]

It has been held that on a coram nobis proceeding some judge other than the judge who presided at the time of plea and sentence should hear the case and if the judge is a material witness he himself should not hear the case but should disqualify himself.[29]

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23. Lyon's Case, 15 F. Cas. 1183, 1184 (No. 8,646) (C.C.D. Vt. 1798); *see* Orfield, Criminal Procedure Under the Federal Rules 684-686 (1966); *See also* 6 J. Wigmore, Evidence § 1909 (3d ed. 1940). Case of Fries, 9 F. Cas. 826, 872, 874 (No. 5,126) (C.C.D. Pa. 1799). District Judge Peters testified. The other judge was Circuit Justice Iredell. People v. McDermott, 180 Misc. 247, 40 N.Y.S.2d 456 (Sup. Ct. 1943), *citing* 6 J. Wigmore, Evidence § 1909, at 588 (3d ed. 1940). *Cf.* Downey v. United States, 91 F.2d 223, 230, 234, 236 (D.C. Cir. 1937); Note, 11 S. Cal. L. Rev. 361 (1938). The court of appeals considered the point although it was not raised and objected to at the time.

24. Lepper v. United States, 233 F. 227 (4th Cir. 1916), *quoted in* Terrell v. United States, 6 F.2d 498, 499 (4th Cir. 1925).

25. *Id.* at 230.

26. *In re* Murchison, 349 U.S. 133, 139 (1955). The Court cited Hale v. Wyatt, 73 N.H. 214, 98 A. 379 (1916); Note, *Witnesses-Competence—Competency of Presiding Judge as Witness*, 28 Harv. L. Rev. 115 (1914).

27. Terrell v. United States, 6 F.2d 498, 499 (4th Cir. 1925).

28. Borgia v. United States, 78 F.2d 550, 554 (9th Cir. 1935), *cert. denied*, 296 U.S. 615 (1935).

29. United States v. Halley, 240 F.2d 418 (2d Cir. 1957). *But see* Dillon v. United States, 307 F.2d 445, 453 (9th Cir. 1962) (dissenting opinion).

Relationship to Party

The danger of prejudice is apparent where the presiding judge is related to one of the parties in the law suit. In such circumstances the judge is obligated to disqualify himself even where the parties have consented to his presiding.[30] Similarly where the judge is related to the attorneys involved he should also disqualify himself.[31]

Participation in such circumstances also involves ethical considerations for in 1942 the Judicial Conference of Senior Circuit Judges adopted the following resolution: "That it is the sense of the Conference that federal judges should avoid sitting in cases in which their near relatives are of counsel, as contrary to the spirit of canon 13 of the Canons of Ethics of the American Bar Association."[32]

LEGISLATIVE HISTORY OF THE BIAS STATUTE

The present federal bias statute provides:[33]

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The debates in Congress in 1910 and 1911 showed "a surprising unanimity in favor of this new remedy."[34] Congressman Mann of Illinois pointed out that it had been successfully used in the western states for over thirty years, as well as in foreign countries such as Germany, Spain and France.

When the proposed statute was before the House of Representatives, Representative Cullop of Indiana, its sponsor, was asked whether it left to the discretion of the district judge the determination of whether the affidavit was sufficient to disqualify. His reply was:

> Mr. Cullop: . . no it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of juris-

30. *In re* Eatonton Elec. Co., 120 F. 1010 (S.D. Ga. 1903). There are no prior Federal cases on the subject of consanguinity. *See also Ex parte* N.K. Fairbank Co., 194 F. 978, 986, 987 (M.D. Ala. 1912); *In re* Fox West Coast Theatres, 25 F. Supp. 250, 257-58 (S.D. Cal. 1936), *aff'd*, 88 F.2d 812 (9th Cir.), *cert. denied*, 301 U.S. 710 (1937).

31. State v. Deutsch, 34 N.J. 190, 199, 168 A.2d 12, 19 (1961).

32. *The Judicial Conference of Senior Circuit Judges*, 28 A.B.A.J. 817, 820 (1942).

33. 28 U.S.C. § 144 (1948).

34. Putnam, *Recusation*, 9 Cornell L.Q. 1, 10 (1923).

> diction in the case. Mr. Cox: . . Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge? Mr. Cullop: No; it expressly provides that the judge shall proceed no further.[35]

The statute was modeled directly after similar Indiana statutes[36] which have been construed as providing for automatic disqualification.[37]

In 1948 the words "at which the proceeding is to be heard" were added to clarify the meaning of "before the beginning of the term."[38]

CONSTITUTIONALITY

It has been held that Congress cannot "lawfully enact that a judge, who is in truth qualified, is in law disqualified because a suitor makes an affidavit to that effect, and make that ex parte statement conclusive proof of the disqualification and cut off all judicial inquiry as to the judge's competency."[39] The disqualification of a judge to try a particular case must rest on the facts which render him unfit. The existence of such facts must be determined as a judicial question by some judicial tribunal. If the filing of the affidavit operated to disqualify the judge from further acting in the litigation we would have a situation where the

> affidavit maker in fact, though not in name, puts on the judicial robes and excludes the presiding judge and all other judicial authority from any voice in determining the matter, and by the mere filing of an affidavit renders judgment of disqualification and executes it.[40]

INTERPRETATION OF STATUTE

There were several possible approaches to the interpretation of the statute. The various state court interpretations are set forth in *Ex Parte Fairbank Co.*:[41]

> The decisions in states having statutes similar to the Judicial Code are conflicting. The courts in some of the states hold that the affidavit shuts off all judicial inquiry, and, even though the facts alleged may be insufficient to show bias or prejudice, that the judge is bound to grant the application. In other jurisdictions it is held that, while the truth of the facts alleged cannot be contested, yet if the facts alleged, taking them to be true, do not show personal bias or prejudice, the application should be refused. Other cases hold that

35. 46 Cong. Rec. 2627 (1911). *See also* United States v. Flegenheimer, 14 F. Supp. 584, 589 (D.N.J. 1935).
36. Ind. Stat. Ann. §§ 2-1401, 9-1301 (1933).
37. *See* Note, 38 Ind. L.J. 289 (1963).
38. United States v. Gilboy, 162 F. Supp. 384, 388 (M.D. Pa. 1958).
39. *Ex parte* Fairbanks Co., 194 F. 978, 996-97 (M.D. Ala. 1912). *See* Annot., 5 A.L.R. 1275 (1920).
40. *Id.* at 999.
41. *Ex parte* N.K. Fairbanks Co., 194 F. 978, (M.D. Ala. 1912). *See* Note, 21 Colum. L. Rev. 387 (1921); Note, 79 Harv. L. Rev. 1435, 1437 (1966).

> the truth of the affidavit is subject to contest, to be tried before the judge in question, and upon the proof made before him the application must be granted or overruled.[42]

Federal interpretation has also been split. One district court has stated that "ever since the enactment of the Statute in 1912, the Courts have sought to protect federal trial judges against the unilateralness of the procedure by limiting its scope strictly, and construing it literally and narrowly."[43]

However, another district court has held that the statute "should be interpreted liberally. . . . On the other hand, it cannot be used frivolously."[44]

Nevertheless, numerous later decisions in the lower federal courts have adopted the narrow interpretation and the Supreme Court has consistently declined to review them.[45] The failure of Congress to change the law in 1948 in any material respect indicates legislative approval to such strict construction.

There are several safeguards against abuse of the statute. If the affidavit is untruthful, the maker may be prosecuted for perjury and the attorney may be disbarred. There must be a timely filing of the affidavit, and only one change of judge is permitted. The affiant must state his reasons for the belief that bias exists. He must allege personal bias. The affiant has the advantage of delaying the trial, whether or not the judge is disqualified, and even if the affidavit is insufficient, at the end of a losing trial the maker may appeal.

It has been stated that counsel of record "has an obligation which he owes to the court as well as to his client, and he owes a public duty to aid the administration of justice, to uphold the dignity of the court and respect its authority."[46]

Automatic Disqualification

Automatic disqualification would doubtless result in abuses. In states having only one district, a judge from another district would have to be called in, and possibly litigants would maneuver not to be tried by certain judges. In those states where automatic disqualification does exist, it has been widely criticized.[47]

Use of Another Judge to Pass on Disqualification

One method of giving better protection to litigants is to submit the question of bias to a second judge,[48] and this has been done in a few cases.[49] Also

42. *Id.* at 989.
43. Cole v. Loew's Inc., 76 F. Supp. 872, 875 (S.D. Cal. 1948). *See also* United States v. Valenti, 120 F. Supp. 80, 83 (D.N.J. 1954); United States v. Gilboy, 162 F. Supp. 384, 388 (M.D. Pa. 1958) (citing numerous cases).
44. Allen v. Du Pont, 75 F. Supp. 546, 549 (D. Del. 1948); United States v. Gilboy, 162 F. Supp. 384, 389 (M.D. Pa. 1958).
45. Note, 47 Mich. L. Rev. 846, 847 (1949).
46. United States v. Onan, 190 F.2d 1, 7 (8th Cir.), *cert. denied,* 342 U.S. 869 (1951).
47. Note, 38 Ind. L.J. 289 (1963).
48. Schwartz, *Disqualification for Bias in the Federal District Court,* 11 U. Pitt. L. Rev. 415, 429 (1950); Note, 16 U. Chi. L. Rev. 349, 353 (1949).
49. Craven v. United States, 22 F.2d 605, 607 (1st Cir.), *cert. denied* 276 U.S. 627 (1927); Note, 13 Cornell L.Q. 454 (1928).

some judges have referred an affidavit of prejudice to the executive committee of the district for determination.[50] Nevertheless, in the vast majority of cases the judge himself passes on the sufficiency.[51]

RETROACTIVITY

Although it has been that the statute was not retroactive,[52] the Court of Appeals in *Henry v. Speer* rejected this holding and held otherwise.[53]

APPELLATE COURTS

The statute on bias does not apply to appellate courts.[54] Accordingly "whether a member of the Court of Appeals should disqualify himself because in his opinion he is so related or connected with any party or his attorney as to render it improper for him to sit in the appeal is a matter confided to the conscience of the particular judge."[55]

Thus, a judge of the court of appeals who presided at the first trial of the criminal defendant, which conviction was thereafter reversed, may sit on the appeal from the second conviction.[56]

Similarly, where on a criminal appeal the bench of three judges reversed the conviction by a vote of two to one and the case then came on for rehearing before the Court of Appeals sitting en banc, one judge of the three who sat originally may sit again even though the two who voted for reversal were absent, and the rehearing resulted in affirmance of the conviction.[57]

Mr. Justice Jackson has stated in a concurring opinion:

> No statute prescribes ground upon which a Justice of this Court may be disqualified in any case. The Court has never undertaken by rule of Court or decision to formulate any uniform practice on the subject. Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances. . . . There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case.[58]

50. United States v. Irving, 241 F.2d 306 (7th Cir.) *cert. denied* 353 U.S. 983 (1957).
51. United States v. Buck, 18 F. Supp. 827, 829 (W.D. Mo. 1937).
52. Henry v. Harris, 191 F. 868, 874 (S.D. Ga. 1912). *See also Ex parte* N.K. Fairbank Co., 194 F. 978, 985 (M.D. Ala. 1912); *Ex parte* Glasgow, 195 F. 780, 782 (N.D. Ga. 1912).
53. Henry v. Speer, 201 F. 869, 871 (5th Cir. 1913). The statute is set forth in *id.*
54. Kinney v. Plymouth Rock Squab Co., 213 F. 449 (1st Cir. 1914); Millslagle v. Olson, 128 F.2d 1015 (8th Cir. 1942); Ginger v. Cohn, 255 F.2d 99 (6th Cir. 1958); MacNeil Bros. Co. v. Cohen, 264 F.2d 186, 189 (1st Cir. 1959); Sanders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924).
55. MacNeil Bros. Co. v. Cohen, 264 F.2d 186, 189 (1st Cir. 1959), *citing*, 28 U.S.C. §§ 47, 455 (1958).
56. United States v. Perlstein, 126 F.2d 789, 806 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942).
57. Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964).
58. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 897 (1945).

It should be noted, however, that the Justices of the Supreme Court have been quite liberal in disqualifying themselves. As one court has stated:

> we notice that the several attorneys general, having charge of over twenty thousand cases annually filed in the eighty-four district courts, in which the United States is a party and of most of which they could have no knowledge of the facts involved, upon becoming members of the Supreme Court has disqualified themselves in all Supreme Court proceedings affecting any such litigation.[59]

The only statutory limitation on an appellate judge is that if he presided at the trial of a particular case he cannot hear or determine the appeal of that case.[60]

Referee in Bankruptcy

The statute on disqualification of a judge does not apply to a referee in bankruptcy.[61]

Territorial Scope

The disqualification statute originally applied only to the District Courts of the United States.[62] It did not apply to Alaska, the Virgin Islands, the Canal Zone and Guam.[63] Upon the revision of the Judicial Code in 1949 it was made to apply to Hawaii and Puerto Rico, but not Alaska.

Who May Move to Disqualify

The motion to disqualify can be made only by a party to the litigation.[64] It is not enough that it is made by his attorney in fact.[65] The consent of the court is not required for the filing of the affidavit.[66]

The Affidavit

The filing of the affidavit is essential, and the case will not be reversed on appeal in the absence of such filing.[67]

Where a federal criminal defendant wishes to disqualify the judge he should proceed as provided in the statute, or he will not be permitted to introduce evidence of an otherwise collateral matter for the purpose of discrediting the

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59. Connelly v. United States Dist. Ct., 191 F.2d 692, 696 (9th Cir. 1951).
60. 28 U.S.C. (1948).
61. Fish v. East, 114 F.2d 177, 200 (10th Cir. 1940); Ginger v. Cohn, 255 F.2d 99 (6th Cir. 1958).
62. Tjosevig v. United States, 255 F. 5, 6 (9th Cir. 1919).
63. Callwood v. Callwood, 127 F. Supp. 179, 180 (D. V. I. 1954).
64. Anchor Grain Co. v. Smith, 297 F. 204, 205 (5th Cir. 1924); De Ran v. Killits, 8 F.2d 840 (6th Cir. 1925); *In re* Milwaukee & Sawyer Bldg. Corp., 79 F.2d 478 (7th Cir. 1935).
65. Cuddy v. Otis, 33 F.2d 577, 578 (8th Cir. 1929).
66. Walker v. United States, 113 F.2d 314, 318 (9th Cir. 1940).
67. Coppedge v. United States, 311 F.2d 128, 133 (D.C. Cir.), *cert. denied,* 373 U.S. 946 (1962); United States v. Inches, 253 F. Supp. 312 (D. Ariz. 1966).

judge and attempting to show his animus.[68] Any references to judicial bias in the brief will be stricken by the court of appeals.

The affidavit must be strictly construed and must conform to the statute.[69]

It was originally held that the affidavit should not be merely on information and belief as to the personal bias of the judge,[70] but in 1921 the Supreme Court ruled that the facts may be alleged on the affiant's information and belief.[71] Further, "it was not within the province of the trial judge to pass upon the good faith of the defendant, the affidavit being sufficient in form and accompanied by the required certificate of counsel as to good faith."[72]

An affidavit of prejudice must be sworn to or affirmed,[73] and a party may not file more than one affidavit in the case.

An affidavit obviously malicious and scandalous toward the judge may constitute contempt of court.[74] Similarly, an attorney who certifies to the good faith of an affidavit made by his client charging impeachable offenses against the judge may be prosecuted for contempt.[75] Also, filing a belated affidavit against a judge before whom matters in litigation are pending undecided may be contempt of court as constituting an improper effort to influence a judicial decision.[76]

The criminal defendant's affidavit of prejudice against the judge does not divest the court of jurisdiction over the subject-matter or person of the defendant, but merely affects the power of the judge against whom the affidavit is directed to proceed.[77]

Affidavits Filed by the Government

Where affidavits of prejudice are filed by the Government, the persons

68. Wierse v. United States, 252 F. 435, 442 (4th Cir.), *cert. denied,* 248 U.S. 568 (1918). *See also* Keown v. Hughes, 265 F. 572, 577 (1st Cir. 1920).

69. Henry v. Harris, 191 F. 868, 872 (S.D. Ga. 1912), *rev'd on other grounds,* 201 F. 872 (5th Cir. 1913). *See also* Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913); Keown v. Hughes, 265 F. 572, 576 (1st Cir. 1920); Beland v. United States, 117 F.2d 958, 960 (5th Cir. 1941), *cert. denied,* 313 U.S. 585 (1941); Scott v. Beams, 122 F.2d 777, 787-88 (10th Cir.), *cert. denied,* 315 U.S. 809 (1941); United States v. 16,000 Acres of Land, 49 F. Supp. 645, 648 (D. Kansas 1942).

70. *Ex parte* N.K. Fairbank Co., 194 F. 978, 985, 992 (M.D. Ala. 1912).

71. Berger v. United States, 255 U.S. 22 (1921). *See also* Korer v. Hoffman, 212 F.2d 211, 212 (7th Cir. 1954).

72. Morris v. United States, 26 F.2d 444, 449 (8th Cir. 1928). *See also* Simmons v. United States, 302 F.2d 71, 73 (3d Cir. 1962). *But see* Johnson v. United States, 35 F.2d 355, 357 (W.D. Wash. 1929).

73. *In re* Beecher, 50 F. Supp. 530, 531 (E.D. Wash. 1943); United States v. Inches, 253 F. Supp. 312 (D. Ariz. 1966). See United States v. Buck, 23 F. Supp. 508, 509 (W.D. Mo. 1938), *appeal dismissed,* 102 F.2d 976 (8th Cir. 1938). *See also* Martin v. Texas Indem. Ins. Co., 214 F. Supp. 477, 480 (N.D. Tex.), *cert. denied,* 377 U.S. 971 (1962).

74. Fleming v. United States, 279 F. 613 (9th Cir. 1922).

75. Laughlin v. United States, 151 F.2d 281, 284 (D.C. Cir.), *cert. denied,* 326 U.S. 777 (1945).

76. American Brake Shoe & F. Co. v. Interborough R.T. Co., 6 F. Supp. 215, 219 (S.D.N.Y. 1933).

77. Carroll v. Zerbst, 76 F.2d 961 (10th Cir. 1935).

filing must have authority to do so. Special attorneys for the Department of Justice must evidence their authority to so act.[78]

In 1954 there was decided one of the first federal criminal cases in which the affidavit of prejudice was made by the government.[79] The judge declined to disqualify himself, striking the affidavit as scandalous. Prior to the affidavit the judge had stricken the most important counts in the indictment against the defendant as too vague, and the court of appeals had sustained him in large part.

TIME OF FILING AFFIDAVIT

Under the statute the affidavit of disqualification should be filed ten days before term, unless good cause is shown to do otherwise. Tendering it on the eve of a second trial, six weeks after mandate of the appellate court went down, was held to be too late.[80] The only excuse was that the mandate was not filed in the trial court until after the term began. Where an affidavit was not filed ten days before the beginning of the term, and good cause for the delay was not shown, and it was filed for the purpose of delay, containing assertions which were untrue, irrelevant, or scandalous, there was no disqualification.[81] It is too late to file the affidavit at the conclusion of the trial.[82]

Although it may be better practice to permit a late filing of an affidavit of prejudice then to strike it, refusing to permit it to be filed is not prejudicial error.[83]

Where the indictment is found less than ten days before commencement of term, the affidavit must be filed as soon as practicable before the term begins, or where the indictment is found after the term has begun, as soon as disqualifying facts are known, unless good cause is shown for delay.[84] In the absence of a statute, the challenge must be made at the first opportunity after discovery of facts tending to prove disqualification. There have been a number of cases in which the rule has not been strictly adhered to due to mitigating

78. United States v. 16,000 Acres of Land, 49 F. Supp. 645, 651 (D. Kan. 1942).

79. United States v. Lattimore, 125 F. Supp. 295 (D.D.C. 1954). *See also* United States *ex rel.* Rogers v. Richmond, 178 F. Supp. 44 (D. Conn. 1958) (A state warden attacked the qualifications of the judge in a proceeding involving a state prisoner.); United States v. Ritter, C.J., 273 F.2d 30 (10th Cir.), *cert. denied*, 362 U.S. 946 (1959) (civil case).

As to an earlier federal criminal case *see* Rosenwald, *Affidavits of Bias and Prejudice Disqualifying Federal Judges*, 20 St. Louis L. Rev. 321, 329 (1935). *See also* Ratner, *Disqualification of Judges for Prior Judicial Actions*, 3 How. L.J. 228, 248-249 (1957).

80. Shea v. United States, 251 F. 433, 434-35 (6th Cir. 1918). *See also Ex parte* Glasgow, 195 F. 780, 782 (N.D. Ga. 1912); Faubus v. United States, 254 F.2d 797, 804 (8th Cir.) *cert. denied*, 358 U.S. 829 (1958).

81. Anderson Coal Co. v. Waban Rose Conservatories, 278 F. 945 (D. Mass. 1921). (The affidavit was ordered to be stricken from the record.).

82. Walker v. United States, 113 F.2d 314, 318 (9th Cir. 1940).

83. Shea v. United States, 251 F. 433, 435 (6th Cir.), *cert. denied*, 248 U.S. 581 (1918).

84. Chafin v. United States, 5 F.2d 592, 594 (4th Cir.), *cert. denied*, 269 U.S. 552 (1925). *See also* Bishop v. United States, 16 F.2d 410, 411 (8th Cir. 1926), *modified*, 19 F.2d 224 (8th Cir. 1927); Rossi v. United States, 16 F.2d 712, 716 (8th Cir. 1926); Wyant v. Brennan, 85 F.2d 920 (4th Cir. 1936); Scott v. Beams, 122 F.2d 777, 788 (10th Cir.), *cert. denied*, 315 U.S. 809 (1941).

circumstances such as where the defendant's counsel had refused to follow the defendant's request to file an affidavit[85] or where the presiding judge had only been assigned four days before trial.[86]

But affidavits have been held to be untimely where the excuse for late filing was the death of one of three of the defendant's attorneys,[87] or where an uncounselled defendant who had had considerable experience in criminal courts had not filed his affidavit in a timely fashion.[88]

Certificate of Counsel

An affidavit without certificate of counsel of record is ineffectual to disqualify the judge.[89] A court has stated: "The certificate of counsel that the affidavit and application are made in good faith is indispensable as a precaution against abuse, and strict and full compliance with the provisions of the statute is required."[90]

The phrase "counsel of record" has been held to mean an "attorney at law admitted to the bar of the court who has been counsel of record in the case."[91] Thus, affidavits certified to have been made in good faith by nonresident counsel who had never been admitted as attorneys of the court, were not certified by counsel of record as required by the statute.[92]

The certificate should be by individual counsel and not by a partnership.[93]

A district court has ruled that the certificate of counsel must be as to counsel's own good faith and not the good faith of the criminal defendant.[94] Another district court has stated: "While the belief is that of the defendant,

85. Morris v. United States, 26 F.2d 444, 449 (8th Cir. 1928).

86. Lipscomb v. United States, 33 F.2d 33, 34 (8th Cir. 1929). *See also* Tennessee Publ. Co. v. Carpenter, 100 F.2d 728, 734 (6th Cir.), *cert. denied,* 306 U.S. 659 (1934); United States v. Buck, 23 F. Supp. 508 (W.D. Mo.), *appeal dismissed,* 102 F.2d 976 (8th Cir. 1938); Duncan v. United States, 48 F.2d 128, 134 (9th Cir.), *cert denied,* 283 U.S. 863 (1931). Bommarito v. United States, 61 F.2d 355 (8th Cir. 1932). Bowles v. United States, 50 F.2d 848, 850 (4th Cir.), *cert. denied,* 284 U.S. 648 (1931). Bennett v. United States, 158 F.2d 412, 416 (8th Cir. 1946), *cert. denied,* 331 U.S. 822 (1947).

87. Eisler v. United States, 170 F.2d 273, 277 (D.C. Cir. 1948). Judge Prettyman dissented, pointing out that due diligence was the test in the District of Columbia. *Id.* at 283.

88. Eisler v. United States, 338 U.S. 189 (1949), (5-4 decision); Hibdon v. United States, 213 F.2d 869 (6th Cir. 1954); United States v. Gilboy, 162 F. Supp. 384, 389 (M.D. Pa.), *aff'd,* Green v. Murphy, 259 F.2d 591 (3d Cir. 1958).

89. Alaska Bar Ass'n v. Dickerson, 240 F. Supp. 732, 735 (D. Alas. 1965).

90. Cuddy v. Otis, 33 F.2d 577, 578 (8th Cir. 1929). *See also* Newman v. Zerbst, 83 F.2d 973 (10th Cir. 1936).

91. Currin v. Nourse, 74 F.2d 273, 275 (8th Cir. 1934), *cert. denied,* 294 U.S. 729 (1935). *See also* United States v. Onan, 190 F.2d 1, 6 (8th Cir.), *cert. denied,* 342 U.S. 869 (1951); United States v. Garden Homes, Inc., 113 F. Supp. 415, 418 (D.N.H. 1953).

92. *Ex parte* N.K. Fairbank Co., 194 F. 978, 985 (M.D. Ala. 1912). *See also* Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 587-88 (W.D. Tenn. 1924); Morse v. Lewis, 54 F.2d 1027, 1031 (4th Cir.), *cert. denied,* 286 U.S. 557 (1932); Currin v. Nourse, 74 F.2d 273, 275 (8th Cir. 1934), *cert. denied,* 294 U.S. 729 (1935); United States v. Gilboy, 162 F. Supp. 384, 391 (M.D. Pa. 1958); Freed v. Inland Empire Ins. Co., 174 F. Supp. 458, 464 (D. Utah 1959).

93. Benedict v. Seiberling, 17 F.2d 831, 838 (N.D. Ohio 1926).

94. United States v. Flegenheimer, 14 F. Supp. 584, 592 (D.N.J. 1935), *appeal dismissed,* 110 F.2d 379 (3d Cir. 1936) (Appellant died.). *See also* United States v. Parker, 23 F. Supp. 880, 886 (D.N.J. 1938).

the good faith certified to as to the affidavit and certificate includes that of counsel."[95]

In another case it was stated:

> A certificate of good faith must mean, at the least, that counsel has some belief that the motion is arguably proper. The certificate is a continuing representation. . . . At an appropriate time I will consider what, if any, disciplinary action is necessary. Cf. Rule 11, Fed. Rules Civil Proc.[96]

As long as the criminal defendant "honestly believed that the judge was biased and stated on what facts he based his opinion, it was his right to call on his counsel to give the certificate provided by the statute in order to have the question of bias determined."[97]

Where the criminal defendant had counsel of record at all times and counsel declined to sign the certificate of bias, the defendant is not entitled to file such an affidavit on the ground that he was representing himself in the matter.[98] While the question has not been definitively answered, where the applicant for disqualification is without counsel the omission of the certificate of counsel "probably is not fatal."[99]

Where a criminal defendant is represented by counsel of record, he cannot evade the requirement of a certificate of counsel even though such counsel is unwilling to give the certificate.[100] Where the defendant has several counsel during the proceeding and the first counsel has not withdrawn his appearance, the certificate should be made by such first counsel.

An attorney who certifies to the good faith of an affidavit made by his client charging impeachable offenses against the judge may be prosecuted for contempt.[101]

Personal Bias

The affidavit must specifically allege personal prejudice and bias toward the party seeking disqualification.[102] As the Supreme Court has stated: "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular

95. United States v. Gilboy, 162 F. Supp. 384, 392 (M.D. Pa. 1958). *See also* Freed v. Inland Empire Ins. Co., 174 F. Supp. 458, 465 (D. Utah 1959); *Cf. In re* Union Leader Corp., 292 F.2d 381, 385 (1st Cir.), *cert. denied,* 368 U.S. 927 (1961).

96. Denis v. Perfect Parts, 142 F. Supp. 263, 264 (D. Mass. 1956).

97. Flegenheimer v. United States, 110 F.2d 379, 381 (3d Cir. 1936). *But see In re* Union Leader Corp., 292 F.2d 381, 385 (1st Cir.), *cert. denied,* 368 U.S. 927 (1961).

98. Beland v. United States, 117 F.2d 958, 960 (5th Cir.), *cert. denied,* 313 U.S. 585 (1941).

99. *In re Beecher,* 50 F. Supp. 530, 531 (E.D. Wash. 1943).

100. Mitchell v. United States, 126 F.2d 550, 552 (10th Cir.), *cert. denied,* 316 U.S. 702 (1942).

101. Laughlin v. United States, 151 F.2d 281, 284 (D.C. Cir.), *cert. denied,* 326 U.S. 777 (1945).

102. Henry v. Harris, 191 F. 868, 872 (S.D. Ga.), *rev'd on other grounds,* 201 F. 872 (5th Cir. 1913). *See also* Henry v. Speer, 201 F. 869, 871 (5th Cir. 1913).

case."[103] It is not sufficient to allege an "impersonal prejudice."[104] Thus it has been held insufficient to allege merely that the judge was a director or trustee of the bank which had been robbed by the defendant.

In the leading decision of *Berger v. United States*,[105] the Supreme Court decided the question of whether a trial judge who had expressed strong anti-German emotions was qualified to try Germans for espionage after the First World War. The Court held the judge disqualified. Mr. Justice Reynolds asserted in dissent: "A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. . . . Neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."[106] Professor Kenneth C. Davis after referring to this case asks, "Who is best qualified to try a Communist for advocating overthrow of the government by force—a Communist, an anti-Communist, or one who is on the fence between Communism and democracy?"[107]

In the *Berger* case the Court held that the mere filing of a sufficient affidavit will compel a trial judge to disqualify himself, and the judge may not pass upon the truth or falsity of the charges made in the affidavit. Upon the filing of an affidavit in conformity with the statute averring the affiant's belief that the judge before whom the case is to be tried has a personal bias or prejudice against him, and stating facts and reasons, substantial in character and which, if true, fairly establish a mental attitude of the judge against the affiant which may prevent impartiality of judgment, it becomes the duty of the judge to retire from the case.[108] There is little for a defendant to gain in having his case tried by one judge rather than another, and the penalty for perjury is so severe that this rule will work no mischief. A later case thus interpreted the decision: "Their statements were made against a class of which the defendant was a member. They evinced pronounced personal prejudice against that class showing a personal prejudice against the defendant."[109]

In *Eisler v. United States*,[110] the court of appeals held that an affidavit reflecting on the background of the trial judge as a special assistant to the Attorney General, alleging that the judge, in that capacity, directly assisted

103. *Ex parte* American Steel Barrel Co., 230 U.S. 35, 43 (1913). *See also* Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924); Ryan v. United States, 99 F.2d 864, 871 (8th Cir.), *cert. denied*, 306 U.S. 635 (1938).

104. Price v. Johnston 125 F.2d 806, 811 (9th Cir.), *cert. denied*, 316 U.S. 677 (1942).

105. Berger v. United States, 255 U.S. 22 (1921) (6-3); Note, 21 Colum. L. Rev. 387 (1921).

106. *Id.* at 43.

107. K.C. Davis, Cases on Administrative Law 447 (1951).

108. This case was follwed in Nations v. United States, 14 F.2d 507, 509 (8th Cir.), *cert. denied*, 273 U.S. 735 (1926). *See also* United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965); Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966).

109. Ryan v. United States, 99 F.2d 864, 871 (8th Cir.), *cert. denied*, 306 U.S. 635 (1939).

110. Eisler v. United States, 170 F.2d 273, 278 (D.C. Cir. 1948) (Prettyman, J., dissenting). For a criticism of this case *see* Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. Pitt. L. Rev. 415, 421-23 (1950).

FBI inquiries into the activities of aliens and Communists, including the affiant, alleging that the judge was a close friend of the director of the FBI, and that the judge had, in connection with other duties, sponsored legislation providing for the deportation of other Communists, did not allege personal bias; hence the affidavit was properly stricken. The defendant was an alien Communist. The Supreme Court granted certiorari, but when the defendant became a fugitive, the Court left the case off the docket,[111] and then dismissed the petition for certiorari.[112]

In *Foster v. Medina*,[113] the affidavit alleged that on a motion for a continuance of ninety days to brief the constitutionality of an anti-Communist statute the judge stated that public policy required that the matter not be held off indefinitely when perhaps there might be "some more of these fellows up to that sort of thing," that he was not going to give anything like ninety days, and, that in answer to the argument that the indictment alleged no acts of force or violence, he asserted, "No, they want to wait until they get everything set and then the acts will come," was not sufficient. A writ of mandamus was refused.

In *United States v. Fujimoto*,[114] an affidavit did not show personal bias in a Smith Act prosecution where it alleged that the defendant had made prior written attacks on the judge in a newspaper, a prior correct statement by the judge as to the Smith Act, or prior objection by the judge to a speaker at a dedication ceremony on the ground of the speaker's identification with a Communist front organization.

Since the litigant must show personal bias the statute "applies only to a comparatively rare situation and is relatively ineffective in some cases where there is an appearance of partiality."[115]

Alleging the Facts

Most states have statutes providing for disqualification of judges for prejudice, and the majority require that the affidavit set forth the facts showing disqualification.[116]

Their statutes are not applicable "save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice."[117] More specifically the statutes require

111. Eisler v. United States, 338 U.S. 189 (1949) (5-4).
112. 338 U.S. 883 (1949).
113. Foster v. Medina, 170 F.2d 632 (2d Cir.), *cert. denied*, 335 U.S. 909 (1948); Note, 47 Mich. L. Rev. 846 (1949).
114. United States v. Fujimoto, 101 F. Supp. 293 (D. Hawaii 1951).
115. Note, 16 U. Chi. L. Rev. 349, 353 (1949).
116. Note, 16 Colum. L. Rev. 163, (1916).
117. *Ex parte* American Steel Barrel Co., 230 U.S. 35 43-44 (1913). *See also* Keown v. Hughes, 265 F. 572, 577 (1st Cir. 1920); Minnesota & Ont. Paper Co. v. Molyneux, 70 F.2d 545, 547 (8th Cir. 1934); Newman v. Zerbst, 83 F.2d 973, 974 (10th Cir. 1936); *Cf.* Tucker v. Kerner, 186 F.2d 79, 83 (7th Cir. 1950); United States v. Bell, 351 F.2d 868,

> not merely the conclusion of the affiant drawn from the facts, but a statement of the facts themselves, and these should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.[118]

The Supreme Court has stated: "Of course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."[119]

Judge Pickett has stated: "To warrant disqualification of a judge, the affidavit must contain more than mere conclusions on the part of the pleader."[120] For example, an allegation in an affidavit of bias that the judge had told the grand jury that evidence existed which, if produced and believed, would show a conspiracy and concealment by the defendant and that the judge then knew of no evidence, constituted an allegation of fact which the judge would be required to accept as true, even if false, so as to disqualify himself.[121]

Opinion of Psychiatrist

The opinion of a psychiatrist that the facts of the case show subconscious bias has not been accepted as a basis for recusation of the judge.[122] However, it has been suggested that it be made a basis:

> Therefore, when the judge is presented with the opinion of a psychiatrist that the facts alleged give rise to an inference of prejudice, he should recuse himself, or if he is not yet willing to do so, he should be required to seek further psychiatric evidence from other experts. If this evidence substantiates that presented by the movant, withdrawal of the judge should be mandatory.[123]

Trial of Prior Proceedings

Rulings by the current judge against the defendant in prior trials of like character do not show personal bias,[124] even if the prior suit involved a differ-

878 (6th Cir. 1965); United States v. Fricke, 261 F. 541, 545 (S.D.N.Y. 1919); United States, v. Fujimoto, 101 F. Supp. 293, 297 (D. Hawaii 1951).

118. Morse v. Lewis, 54 F.2d 1027, 1032 (4th Cir.), *cert. denied*, 286 U.S. 557 (1932). *See also* Duncan v. United States, 48 F.2d 128, 134 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931).

119. Berger v. United States, 255 U.S. 22 (1921).

120. Inland Freight Lines v. United States, 202 F.2d 169, 171 (10th Cir. 1953).

121. United States v. Pendergast, 34 F. Supp. 269 (W.D. Mo. 1940).

122. Green v. Murphy, 259 F.2d 591 (3d Cir. 1958).

123. Forer, *Psychiatric Evidence in the Recusation of Judges*, 73 Harv. L. Rev. 1325, 1331 (1960).

124. Sacramento Suburban Fruit Lands Co. v. Tatham, 40 F.2d 894 (9th Cir. 1930); Barnes v. United States, 241 F.2d 252, 254 (9th Cir. 1956); Martin v. United States, 285 F.2d 150 (10th Cir.), *cert. denied*, 365 U.S. 853 (1961); United States v. Valenti, 120 F. Supp. 80, 85 (D.N.J. 1954); *But see* Note, 79 Harv. L. Rev. 1435, 1451 (1966). *See* Wilkes v. United States, 80 F.2d 285, 289 (9th Cir. 1935), where an affidavit of prejudice against defendants prosecuted for using the mails to defraud based upon adverse rulings of the judge in a civil action against the defendants, refusal to postpone the trial, communi-

ent complainant seeking the same relief.[125] The affiant's failure to obtain favorable judgments in similar actions brought before the judge similarly does not show personal bias.[126]

Thus in *United States v. Buck*,[127] a judge's statement, in opinions on motions for new trial in prosecutions for conspiracies against the civil rights of voters in Kansas City, Missouri, that "sinister forces are at work in Kansas City," and that "sinister forces were and are lurking in the background" did not disqualify the judge from trying similar actions where the statements were relevant to matters under discussion in the opinions and were fully justified.

Similarly, a judge presiding at the Mann Act trial of a panderer is not disqualified because he had previously presided at the trial at which the prostitute was convicted, and had thereafter read the presentence report on the prostitute, whose credibility was an important issue in the trial of the panderer.[128] Affidavits stating that the judges of the Central Division of the Southern District of California had adjudicated the bankruptcies out of which the criminal defendant arose and that the principal government witnesses in the instant case were bankrupts adjudicated by these judges are insufficient to show personal bias.[129] The fact the judge assigned a civil action, which was related to the bank robbery prosecution to another judge because his participation in the bank robbery trial made it inadvisable for him to try the civil action, was not a basis for disqualifying himself to hear further motions in the bank robbery prosecution.[130]

Different Stages of the Same Proceeding

One Justice of the Supreme Court, in a concurring opinion, held it improper for a trial judge to confer with an FBI agent regarding the defendant's background before any plea is entered.[131] The Justice argued for a reversal under the supervisory power, rather than as a matter of due process. However,

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cation of prejudice of another judge to the presiding judge, statements of third parties not made to the defendants or to the judge, and belief that the judge had been informed that the defendants had used political influence to impede the prosecution, did not sufficiently support a charge of bias of the judge.

125. Morse v. Lewis, 54 F.2d 1027, 1031 (4th Cir.), *cert. denied*, 286 U.S. 557 (1932); *See* Ratner, *Disqualification of Judges for Prior Judicial Actions*, 3 How. L.J. 228, 238-45 (1957).

126. Curtis v. United States, 91 F. Supp. 206 (D.N.J. 1950).

127. United States v. Buck, 18 F. Supp. 827, 830 (W.D. Mo. 1937). *See also* United States v. Murphy, 19 F. Supp. 987 (W.D. Mo. 1937); *See also* Ryan v. United States, 99 F.2d 864, 871 (8th Cir.), *cert. denied*, 306 U.S. 635 (1939); Ferrari v. United States, 169 F.2d 353 (9th Cir. 1948); Brown v. Buchkoe, 244 F.2d 865, 866 (6th Cir. 1957); Moore v. Buchkoe, 175 F. Supp. 780 (W.D. Mich. 1958).

128. United States v. Chrisos, 291 F.2d 535, 537 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

129. Lyons v. United States, 325 F.2d 370, 376 (9th Cir.), *cert. denied*, 377 U.S. 969 (1963). *See also* United States v. Inches, 253 F. Supp. 312 (D. Ariz. 1966).

130. United States v. Lawrenson, 334 F.2d 568 (4th Cir. 1964).

131. Smith v. United States, 360 U.S. 1, 11, 17-18 (1959). *See* Ratner, *supra* note 125, at 246-52.

this opinion has not been followed and in general will not result in reversal on grounds of bias.

It has been held that an allegation that the judge had had a conference with the United States Attorney regarding the case without the presence of the defendant's attorney does not show bias.[132] A limited discussion by the judge with counsel for the defendants in a civil case, who had represented the judge in a mandamus and prohibition proceeding to review his ruling in such case, was held by the trial court not disqualify the judge from acting in the case,[133] but the court of appeals disagreed.[134]

A judge is not disqualified to try a case because in a bankruptcy proceeding he had ordered an investigation with a view to prosecution.[135]

No bias was held shown in an affidavit charging (1) that a portion of the judge's charge to the grand jury indicated that he had some general knowledge that the subject of jury tampering would be investigated by the grand jury; (2) that the judge conducted a hearing in which the defendant was ordered to answer nonincriminating questions of the grand jury prior to his indictment; (3) that the judge heard evidence on pretrial motions in this case and three related cases, and in disbarment proceedings in two other related matters; (4) and that the judge had recused himself from two related cases.[136]

Critical remarks by the judge at pretrial conference to the party's lawyer do not show bias.[137] The bias must be directed to the party and not to his attorney.

A court of appeals reversed a conviction where the judge who presided in a non-jury trial had previously acquired allegedly incriminating evidence against one of three defendants. The judge had stated: "I think I have one of your men convicted right here."[138]

A judge will not be disqualified where he has judicially formed an opinion as to the law of the case and the rights of the parties and has published it for legitimate purposes.[139] An affidavit based only on the judge's comments on questions of law affecting the sufficiency of the indictment and a continuance, based on the assumption that the allegations in the indictment were true, does not show bias.[140] It was held in a federal criminal case that a mere refusal to

132. Willenbring v. United States, 306 F.2d 944, 946 (9th Cir. 1962); Scott v. Beams, 122 F.2d 777, 788 (10th Cir. 1941).

133. Popkin v. Eastern Air Lines, Inc., 236 F. Supp. 645 (E.D. Pa. 1964).

134. Rapp v. Van Dusen, 350 F.2d 806, 809 (3d Cir. 1965); Note, 17 S.C.L. Rev. 785 (1965); Note, 113 U. Pa. L. Rev. 1310 (1965).

135. Epstein v. United States, 196 F. 354 (7th Cir. 1912). *See* Annot., 10 A.L.R.2d 1318 (1950).

136. United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965).

137. Sanders v. Allen, 58 F. Supp. 417, 419 (S.D. Cal. 1944).

138. McFadden v. United States, 63 F.2d 111, 112 (7th Cir. 1933). *See* Note, 51 Yale L.J. 169, 172-73 (1941).

139. Henry v. Harris, 191 F. 868, 872 (S.D. Ga. 1912), *rev'd on other grounds*, 201 F. 812 (5th Cir. 1913). *See also* Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 585 (W.D. Tenn. 1924); Parker v. New England Oil Corporation, 13 F.2d 497 (D. Mass. 1926).

140. United States v. Foster, 81 F. Supp. 280 (S.D.N.Y.), *mandamus denied*, 170 F.2d 632 (2d Cir. 1948), *cert. denied*, 335 U.S. 909 (1949).

grant the defendant's counsel a long extension of time to plead as requested does not show bias or prejudice of the judge.[141] Nor does mere denial of a continuance show bias or prejudice.[142]

The fact that a judge grants a severance to a criminal defendant does not disqualify him from presiding over the subsequent trial of the severed defendant.[143]

Conviction of a judge of the defendant's guilt based on evidence at a former trial which terminated in a mistrial is not personal prejudice under the federal statute. Otherwise "no judge could be qualified to sit at two trials of the same case."[144] Before the second trial the defendant alleged in his affidavit that when the jury disagreed the judge sent them out telling them that if they were honest men they should go out and bring in a verdict, indicating by his manner a desire for conviction, and kept the jury out all night; that during the trial the judge, while telling the jury that they could not infer guilt from the defendant's failure to testify, by his manner showed that he thought otherwise; and that the judge was prejudiced against liquor law violators as shown by excessive fines and jail sentences.

The Supreme Court has stated, per Justice Frankfurter: "Certainly it is not the rule of judicial administration that, statutory requirements apart, see Judicial Code sec. 21, 28 U.S.C. sec. 25, a judge is disqualified from sitting in a retrial because he was reversed in earlier rulings."[145]

It is clear that the federal judge who tried the case can, after reversal on appeal, retry the case. The mere fact that the judge at the first trial made remarks critical of the conduct of certain witnesses for the defense does not disqualify him.[146] Even though the law of the state in which the federal court sits precludes the same judge from sitting on retrial, such law does not apply to a federal judge.[147]

The Supreme Court of Louisiana has held that the fact that the trial judge had already heard the evidence and had formed an opinion of the guilt of the defendant during the first trial was not a ground for disqualification on retrial.[148] Moreover, the trial judge could not be required by the defendant to testify whether he had formed or expressed an opinion of guilt or innocence. Another court held that where the trial judge concurs in the verdict of the jury without any expression of opinion as to guilt, he is not disqualified to

141. United States v. Fricke, 261 F. 541, 545 (S.D.N.Y. 1919).
142. Caddy v. Otis, 33 F.2d 577 (8th Cir. 1929); Wilkes v. United States, 80 F.2d 285, 289 (9th Cir. 1935); Refior v. Lansing Drop Forge Co., 124 F.2d 440, 444 (6th Cir. 1942).
143. United States v. Holt, 333 F.2d 455, 457 (2d Cir. 1964).
144. Craven v. United States, 22 F.2d 605, 608 (1st Cir. 1927); Note, 13 Corn. L.Q. 454 (1928). *See also* Ratner, *supra* note 141, at 229-38.
145. NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947).
146. Inland Freight Lines v. United States, 202 F.2d 169, 171 (10th Cir. 1953). *See also* Coppedge v. United States, 311 F.2d 128, 133 (D.C. Cir.), *cert. denied*, 373 U.S. 946 (1962); United States v. Malinsky, 153 F. Supp. 321, 325 (S.D.N.Y. 1957).
147. United States *ex rel.* Rogers v. Richmond, 178 F. Supp. 44, 45 (D. Conn. 1958).
148. State v. Angel, 141 La. 921, 75 So. 843 (1917).

preside at a second trial. But where he has expressed a decided opinion of guilt in passing sentence he should not preside at the second trial over objection.[149] However, a different state court held that the trial judge's statements at a former trial, expressing belief in the defendant's guilt and lecturing him, did not disqualify the judge.[150] In Connecticut and Indiana, statutes provide for retrial before another judge after reversal on appeal.[151] This appears to be a sound solution. Reliance merely on the discretion of the trial judge does not appear adequate.

The statute does not apply when the criminal defendant pleads guilty and then files an affidavit of prejudice in order to secure sentencing by another judge.[152] Moreover, the affidavit is not timely.

Where, after sentencing, the defendant moves for reconsideration and reduction of the sentence, and to withdraw his plea of nolo contendere, the sentencing judge may hear the motions, particularly where no objection was raised prior to, or at, the hearing thereon.[153]

A trial judge was held not disqualified because he had read a presentence report containing information prejudicial to the defendant before the case was actually tried; the defendant originally pleaded guilty, and thereafter the presentence report was prepared and presented to the judge. On the day set for sentencing the defendant withdrew his guilty plea, and subsequently the case came up for trial, and no request for disqualification was made.[154]

In a habeas corpus proceeding a judge is not disqualified because he had ruled against the prisoner in a series of former writs, if the only question before the court was one of law, and leave to appeal in forma pauperis was granted.[155]

The fact that the trial judge had previously heard and disposed of a habeas corpus proceeding in connection with the sentence imposed on a prior trial for the same offense did not disqualify the judge in a case in which he had granted a writ of habeas corpus.[156]

The judge by whom sentence in a criminal case was imposed is not bound to disqualify himself upon the hearing of a motion to vacate and correct the sentence, where there is no charge of prejudice and no dispute as to any material fact.[157]

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149. State v. Atterbery, 134 S.C. 392, 133 S.E. 101 (1926).
150. Kolowich v. Wayne Circuit Judge, 264 Mich. 668, 250 N.W. 875 (1933). (Earlier cases are collected.)
151. Ratner, *supra* note 141, at 236-37.
152. United States v. Costea, 52 F. Supp. 3 (E.D. Mich. 1943).
153. Kramer v. United States, 166 F.2d 515, 518 (9th Cir. 1948). *See also* Taylor v. United States, 179 F.2d 640, 642 (9th Cir. 1950).
154. United States v. Kravitz, 303 F.2d 700 (3d Cir.), *cert. denied*, 371 U.S. 922 (1962).
155. Taylor v. United States, 179 F.2d 640, 644 (9th Cir. 1950).
156. United States v. Lowrey, 77 F. Supp. 301 (W.D. Pa. 1948), *aff'd*, 172 F.2d 226 (3d Cir. 1949). *See also* Martin v. United States, 285 F.2d 150 (10th Cir.), *cert. denied*, 365 U.S. 853 (1960). *See* ABA Report on Post-Conviction Remedies 28-31 (1967).
157. Oxman v. United States, 148 F.2d 750 (8th Cir.), *cert. denied*, 325 U.S. 887 (1945); *but see* United States v. Miller, 321 U.S. 752 (1944).

One court has stated:[158]

> Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be mislead. It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that section 2255 of title 28 was inserted in the Judicial Code.

An affidavit for disqualification of the judge on a motion to vacate proceeding is not sufficient when it alleges merely adverse rulings made by the court and subjective conclusions as to the motives of the court and its manner in conducting the trial and subsequent proceedings.[159]

One court of appeals had held that in an error coram nobis proceeding some judge other than the judge who presided at the time of plea and sentence should hear the case.[160]

Disqualification in Contempt Proceedings

Justice Holmes, speaking for the Supreme Court, concerning contempt proceedings, stated:[161]

> The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case.

However, if there is no immediate urgency it is "by far the better policy to call in another judge; and the federal system provides special facility for so doing."[162] The Supreme Court in a later case stated:[163]

> All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

The Supreme Court has held in *Sacher v. United States*,[164] by a vote of five to three that where defense counsel in a criminal trial was guilty of con-

158. Carvell v. United States, 173 F.2d 348 (4th Cir. 1949). *See also* Deitle v. United States, 302 F.2d 116, 118 n.2 (7th Cir. 1962); Dillon v. United States, 307 F.2d 445, 453 (9th Cir. 1962); United States v. Bostic, 192 F. Supp. 170, 171 (D.D.C. 1961).

159. Palmer v. United States, 249 F.2d 8 (10th Cir. 1957).

160. United States v. Halley, 240 F.2d 418 (2d Cir. 1957).

161. United States v. Shipp, 203 U.S. 563 (1906). *See also* Patterson v. Colorado, 205 U.S. 454 (1907).

The mere fact that contempt proceedings were initiated by a court does not disqualify. O'Malley v. United States, 128 F.2d 676, 685 (8th Cir. 1942), *rev'd on other grounds*, 317 U.S. 412 (1943).

162. Toledo Newspaper Co. v. United States, 237 F. 986, 988 (6th Cir. 1916), *aff'd*, 247 U.S. 402, 423 (1918). *See also* Cornish v. United States, 299 F. 283, 285 (6th Cir. 1924).

163. Cooke v. United States, 267 U.S. 517, 539 (1925).

164. Sacher v. United States, 343 U.S. 1 (1952), *aff'g* 182 F.2d 416 (2d Cir. 1950).

tempt of court in the presence of the judge during the trial, the trial judge may summarily impose punishment at the end of the trial without trial by jury. Justices Black and Douglas thought that the defendant had a constitutional right to trial by jury, that another judge should have tried the contempt, and that there should have been notice and a hearing and an opportunity to defend himself. Justice Frankfurter would have required trial by another judge. The delay seemed to indicate that a summary contempt procedure was unnecessary. If the proceeding were under Rule 42 (b) of the Federal Rules of Criminal Procedure, there would be notice and a hearing. Rule 42 (b) provides: "If the contempt charged involves disrespect to or criticism of a judge that judge is disqualified from presiding at the trial or hearing except with defendant's consent."

In the somewhat similar case of *Offutt v. United States*,[165] the Supreme Court remanded the case for trial by a different judge. The trial judge had become personally embroiled with defense counsel throughout the trial and had made a statement to the jury indicating his hostility. The decision was based on the supervisory power of the Court.

In the case of *In re Murchison*,[166] a state judge sitting as a one-man grand jury under the authority of a Michigan statute, charged two witnesses with contempt after one witness had given answers which the judge regarded as perjured and the other had refused to testify unless represented by counsel. The charges were tried by the same judge in open court. The Supreme Court of Michigan upheld the convictions, but the United States Supreme Court reversed on the ground that there was a denial of due process of law in a procedure which allowed the same man who had interrogated witnesses in a prosecutory capacity *in camera* to judge them on charges arising out of conduct during the investigation.

The rules developed in this line of cases were modified by the Supreme Court's holding in *Nilva v. United States*[167] that trial of a party before the trial judge who initiated the contempt proceeding is proper under Rule 42(b) where the contempt does not involve disrespect to or criticism of a judge (*e.g.*, refusal to surrender records demanded pursuant to subpoena). Mr. Justice Black, dissenting, stated:

> But at most Rule 42(b) only permits a negative inference that a judge who prefers contempt charges for violations of his orders and who is intimately involved in related proceedings bearing on these charges can sit in judgment on the alleged contempt.[168]

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165. Offutt v. United States, 348 U.S. 11, 13 (1954) (6-3 decision), *rev'g* 208 F.2d 842 (D.C. Cir. 1953).
For a discussion of the Sacher and Offutt cases *see* Ratner, *supra* note 141, at 242-44.
166. *In re* Murchison, 349 U.S. 133 (1955) (6-3 decision).
167. 352 U.S. 385, 395 (1957).
168. *Id.* at 404.

DUTY OF JUDGE

Upon the filing of the affidavit, accompanied by the required certificate of counsel, it is the duty of the judge to pass on its legal sufficiency, and he need not determine on the facts his own disqualification.[169] The mere filing of the affidavit does not automatically disqualify the judge.[170] He has authority to decide whether the affidavit is sufficient.

While the truth of the affidavit cannot be adjudicated by the judge involved or by anyone else, several judges follow the practice of stating their views for the record in some form.[171] A court of appeals has stated, "It is not inappropriate for a judge to set forth his reasons for disqualifying himself."[172]

THE SUCCESSOR JUDGE

On disqualification of the judge for bias or prejudice, it is not necessary to designate another judge outside the district; all the judges of the district are not disqualified.[173]

Thus, on the filing of an affidavit of prejudice against a federal judge in Puerto Rico the Senior Circuit Judge is not required to appoint a federal judge from the states in the First Circuit where there is already available in Puerto Rico an acting judge fullly empowered to sit by designation of the President of the United States under the Organic Act of Puerto Rico.[174]

VOLUNTARY RECUSATION

Even though the affidavit is insufficient as a matter of law the judge may voluntarily refuse to hear the case on the ground that he is disqualified because of personal prejudice,[175] or to secure a speedy trial and unnecessary litigation of side issues.[176]

An interesting example of voluntary recusation took place in *United States*

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169. Henry v. Speer, 201 F. 869, 872 (5th Cir. 1913).

170. Behr v. Mine Safety Appliances Co., 233 F.2d 371 (3d Cir.), *cert. denied*, 352 U.S. 942 (1956); *In re* Union Leader Corp., 292 F.2d 381, 383 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961).

171. Cole v. Loew's, Inc., 76 F. Supp. 872, 877 (S.D. Cal. 1948); United States v. Valenti, 120 F. Supp. 80 (D.N.J. 1954); United States v. Titus, 122 F. Supp. 179 (N.D.N.Y. 1954); United States v. Lattimore, 125 F. Supp. 295 (D.D.C. 1954); Note, 79 Harv. L. Rev. 1435, 1437 (1966).

172. *In re* Union Leader Corp., 292 F.2d 381, 391 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961). *See also* United States v. Gilboy, 162 F. Supp. 384 (M.D. Pa. 1958); Freed v. Inland Empire Ins. Co., 174 F. Supp. 458 (D. Utah 1959).

173. *In re* De Ran, 260 F. 732, 741 (6th Cir. 1919).

174. Benitez v. Bank of N.S., 141 F.2d 939, 941 (1st Cir.) *cert. denied*, 324 U.S. 859 (1944).

175. Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 588 (W.D. Tenn. 1924); United States v. Valenti, 120 F. Supp. 80, 92 (D.N.J. 1954); Smith v. Insurance Co. of Am., 213 F. Supp. 675, 695 (M.D. Tenn. 1963).

176. United States v. Gilbert, 29 F. Supp. 507, 509 (S.D. Ohio 1939). *See* Cole v. Loew's, Inc., 76 F. Supp. 872, 878 (S.D. Cal. 1948); United States v. Titus, 122 F. Supp. 179, 181 (N.D.N.Y. 1954); United States v. Gilboy, 166 F. Supp. 220 (M.D. Pa. 1958); *See also In re* Union Leader Corp., 292 F.2d 381, 384 n.3 (1st Cir. 1961).

v. Quattrone,[177] where the judge disqualified himself because a lawyer friend, not of counsel in the case, asked him about the expected date of a preliminary ruling and the date of trial. The judge emphasized that he was not required to recuse himself because he had not been influenced. "In making this decision the Court believes that it should consider not only whether what has happened would actually influence the Court, but whether it might give the appearance of so doing."

However, some courts have been critical of this practice:

> The disqualification is automatic if the facts stated in the affidavit are legally sufficient. For this reason, it is just as much the duty of a judge whose competency is challenged, to reject it, if ungrounded, as it is to sustain it when adequate.[178]

Appearance of Bias

The House of Lords has stated, per Lord Cave, that if a member of the court

> is subject to a bias (whether financial or otherwise) in favour of or against either a party to the dispute or is in such position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal.[179]

The mere fact that in the past the judge and the criminal defendant have been long-time political and social friends and that the judge might therefore lean backwards to prove his impartiality does not show personal bias.[180] The concurring judges suggested that to maintain an appearance of impartiality the trial judge might step aside; in that case he later did withdraw.[181]

It has been suggested that an expression of opinion on the merits of a case by a judge could be strong enough to entitle a litigant to some form of relief.[182] Such demonstrates a lack of openmindedness towards a case, and impairs the appearance of a fair trial and a litigant's confidence that justice will be done.[183]

Waiver

In a federal civil case it was held that there could be a waiver of objection to the disqualification of the judge.[184] Such waiver occurs, for example, where a

177. United States v. Quattrone, 149 F. Supp. 240, 241 (D.D.C. 1957). *See also* Smith v. Insurance Co. of Am., 213 F. Supp. 675, 695 (M.D. Tenn. 1963).

178. United States v. Shibley, 112 F. Supp. 734, 748 (S.D. Cal. 1953). *See also* Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966); United States v. Valenti, 120 F. Supp. 80, 92 (D.N.J. 1954).

179. Frome United Breweries Co. v. Bath Justices, [1926] A.C. 586, 590.

180. Green v. Murphy, 259 F.2d 591, 595 (3d Cir. 1958). For the case below, containing a very full discussion *see* United States v. Gilboy, 162 F. Supp. 384 (M.D. Pa. 1958).

181. United States v. Gilboy, 166 F. Supp. 220 (M.D. Pa. 1958).

182. Schwartz, *Disqualification for Bias in the Federal Courts*, 11 U. Pitt. L. Rev. 415, 419-20 (1950); Note, 16 U. Chi. L. Rev. 349, 352 (1949). *See also* Leonard v. Wilcox, 101 Vt. 195, 220, 142 A. 762, 772 (1928) where the judge had stated that no matter what evidence was presented in the second trial of the case his decision would be the same.

183. Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941).

184. *See* Skirvin v. Mesta, 141 F.2d 668, 672 (10th Cir. 1944).

plaintiff has obtained the appointment of a receiver by a judge, and has argued before him and submitted questions relating to administrative matters in the suit, and then later attempt to have the judge disqualified on the grounds of interest.[185] There also may be a waiver where interest of the judge is very slight and both parties request him to proceed.[186]

REMEDIES

Appeal

As of 1960 one study concluded that an appellate court had reversed the trial court's determination that the affidavit was insufficient in only five cases.[187] Thus the remedy by appeal is "grossly inadequate."[188]

An order denying a motion for designation of another judge is not immediately appealable as is not a final judgment.[189] When a final judgment is entered an appeal as to the ruling then lies. The error of the district judge in denying an application for disqualification may not be corrected by application to the senior Circuit Judge to exercise his power of designation, but only by appeal to the Court of Appeals from a final judgment.[190] In 1966 a court of appeals stated:

> The order thus being interlocutory, it is plain that no appeal lies under 28 U.S.C. sec. 1292(a), or under 28 U.S.C. sec. 1292(b) in the absence of certification by the district court and the grant of leave by us.[191]

Where on appeal the affidavit of prejudice is not set forth in the record, the court of appeals will not reverse because of alleged disqualification.[192]

Where, during a rehearing argument on a petition for naturalization, the court commented on a letter which he regarded as having been improperly written to him concerning the case and read a resolution of an organization which cast reflection on the fairness of the court and immediately expressed indignation and denied the petition, the judgment was reversed and remanded for

185. Coltrane v. Templeton, 106 F. 370, 376 (4th Cir. 1901). The judge had pending in the state court a suit by him against the defendant corporation. *But see In re* Eatonton Elec. Co., 120 F. 1010, 1012 (S.D. Ga. 1903).

186. Utz & Dunn Co. v. Regulator Co., 213 F. 315, 318 (8th Cir. 1914). *See also* Lucas v. United States, 325 F.2d 867, 869 (9th Cir. 1963); Adams v. United States, 302 F.2d 307, 309 (5th Cir. 1962).

187. Berger v. United States, 255 U.S. 22 (1921); Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940); Morris v. United States, 26 F.2d 444 (8th Cir. 1928); Nations v. United States, 14 F.2d 507 (8th Cir. 1926); Lewis v. United States, 14 F.2d 369 (8th Cir. 1926).

188. Note, 44 Minn. L. Rev. 941, 982 n.146 (1960). *See also* Note, 16 U. Chi. L. Rev. 349, 350 (1949).

189. McColgar v. Lineker, 289 F. 253 (9th Cir. 1923); Baltuff v. United States, 35 F.2d 507 (9th Cir. 1929); Collier v. Picard, 237 F.2d 234 (6th Cir. 1956); General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 198 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964).

190. *In re* Wingert, 22 F. Supp. 483 (D. Md. 1938).

191. Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966).

192. Gallarelli v. United States, 260 F.2d 259, 261 (1st Cir.), *cert. denied*, 359 U.S. 938 (1958).

retrial by another judge "in an atmosphere of judicial calm."[193] Where the trial judge rejected a suggestion of the court of appeals that another judge sit, the court of appeals then converted the suggestion into a directive.[194]

An appeal from an order striking an affidavit of bias from the files is dismissible for the death of the criminal defendant who filed the affidavit.[195] Where no affidavit was filed before or during trial, and an appeal on the ground of bias and prejudice of the judge was dismissed, an order denying a motion to vacate which had alleged only generalizations, was rendered by a different judge, and affirmed on appeal.[196]

Habeas Corpus

Habeas corpus is not the proper remedy to attack a decision on application for change of judge.[197]

Mandamus

Where in a civil case the district court is proceeding to decide the case on the motion of the petitioner, the petitioner cannot have the judge disqualified by appying to the court of appeals for a writ of mandamus.[198] But mandamus was allowed when the judge was a stockholder in the defendant corporation.[199] The remedy of appeal exists as to an order denying the sufficiency of the affidavit and should be used.[200] Mandamus and prohibition may issue as a substitute where special circumstances exist,[201] such as when several prosecutions are involved.[202] Mandamus may secure relief before trial, appeal only after trial. The interests of both the defendants and the court may make mandamus the correct remedy. Mandamus may be granted by the court of appeals, but not by a single judge thereof.[203]

The court of appeals has granted a writ of prohibition on the ground of because of the judge's personal prejudice where it appeared that the judge, in whose court a defendant's trial for helping to organize the Communist party

193. Moskun v. United States, 143 F.2d 129, 130 (6th Cir. 1944).
For another case in which the court of appeals reversed and remanded for trial by another judge *see* Crowe v. Di Manno, 225 F.2d 652, 659 (1st Cir. 1955). (There was improper cross-examination of witness and comment on evidence.).
194. United States v. Ritter, C.J., 273 F.2d 30, 32 (10th Cir.), *cert. denied*, 362 U.S. 946 (1959).
195. Flegenheimer v. United States, 110 F.2d 379 (3d Cir. 1936).
196. Hibdon v. United States, 235 F.2d 49 (6th Cir.), *cert. denied*, 352 U.S. 900 (1955).
197. Glasgow v. Moyer, 225 U.S. 420, 428 (1912).
198. *In re* Equitable Trust Co., 232 F. 836 (9th Cir. 1916).
199. *In re* Honolulu Consol. Oil Co., 243 F. 348, 353 (9th Cir. 1917).
200. Minnesota & Ont. Paper Co. v. Molyneaux, 70 F.2d 545, 547 (8th Cir. 1934); Dilling v. United States, 142 F.2d 473 (D.C. Cir. 1944); Hurd v. Letts, 152 F.2d 121 (D.C. Cir. 1945).
201. *In re* Lisman, 89 F.2d 898, 899 (2d Cir. 1937).
202. United States v. Murphy, 19 F. Supp. 987, 989 (W.D. Nev. 1937). Deprivation of an attorney's right to practice by disbarment may be a special circumstance. Gladstein v. McLaughlin, 230 F.2d 762, 763-64 (9th Cir. 1955).
203. *In re* Wingert, 22 F. Supp. 483 (D. Md. 1938).

of the United States was pending, stated to defendant's counsel that the defendant is a Communist, and that he, the judge, regrets that the defendant's counsel is defending him, and the judge admitted that he, as United States Attorney, had prosecuted some of the defendant's alleged co-conspirators for contempt for refusal to answer questions, and stated that Communists hide behind the Bill of Rights and at the same time try to destroy such rights, and that he believes the Communist party to be an illegal conspiracy to overthrow the government.[204] This was the first case to grant a writ of prohibition in a disqualification case.

In 1954 the Court of Appeals of the Seventh Circuit denied a writ of mandamus to prevent the judge from trying a criminal case.[205] The proper remedy was held to be appeal. Congress may authorize interlocutory appeals but had not done so as of 1954. Hence, the defendant must be put to the expense and inconvenience of what may prove to be an abortive trial. But the Court of Appeals for the Sixth Circuit upheld the use of mandamus but found the affidavit insufficient.[206]

In the third circuit the procedure on mandamus for disqualification judge has been modified so that the judge, although named as a respondent, "shall be deemed a nominal party only and the prevailing parties in the challenged decision shall be deemed to be respondents and permitted to answer the petition.[207]

Petitions for mandamus "should allege that an unsuccessful request was made for certification under section 1292(b), or why such an application was inappropriate in the circumstances."[208]

The all writs statute, 28 U.S.C. sec. 1651(a), is not confined to instances where the action of the district court will frustrate or impede the ultimate exercise by the court of appeals of its appellate jurisdiction granted in some other provision of the law. As Judge Friendly has pointed out, "Once the area for the use of the prerogative writs is recognized to be not so narrowly restricted, we can think of few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself."[209]

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204. Connelly v. United States Dist. Court, 191 F.2d 692 (9th Cir. 1951) (one judge dissenting).

205. Korer v. Hoffman, 212 F.2d 211, 213, 215 (7th Cir. 1954). *See also* People *ex rel.* Tinkoff v. Campbell, 212 F.2d 785 (7th Cir. 1954); Green v. Murphy, 259 F.2d 591, 594 (3d Cir. 1958) (one judge dissenting); Albert v. United States Dis. Ct., 283 F.2d 61 (6th Cir.), *cert. denied*, 365 U.S. 828 (1960). Federal cases are cited in Annot., 45 A.L.R.2d 953-55 (1956).

206. Williams v. Kent, 216 F.2d 342 (6th Cir. 1954). *See also* Gladstein v. McLaughlin, 230 F.2d 762 (9th Cir. 1955); *In re* United Shoe Mach. Corp., 276 F.2d 77, 78 (1st Cir. 1960); *In re* Union Leader Corp., 292 F.2d 381, 383 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); Rapp v. Van Dusen, 350 F.2d 806, 810 (3d Cir. 1965); Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966).

207. Rapp v. Van Dusen, 350 F.2d 806, 812-13 (3d Cir. 1965); Note, 113 U. Pa. L. Rev. 1310 (1965).

208. Rapp v. Van Dusen, 350 F.2d 806, 813 (3d Cir. 1965). *See* Note, 79 Harv. L. Rev. 1435, 1441 (1966).

209. Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966); *See also* Green v. Murphy, 259 F.2d 591, 595 (3d Cir. 1958).

Possibly this case will start a new trend towards greater use of mandamus in disqualification cases.

One writer has concluded that up to 1950 no writ of mandamus or prohibition had even been granted to disqualify a federal judge.[210] Another writer pointed out in 1960 that only one reported case[211] had allowed mandamus.[212] In 1962 mandamus was allowed in the tenth circuit.[213]

Many commentators favor the use of mandamus to disqualify federal judges.[214] The state courts have readily issued writs of mandamus and prohibition to prevent biased judges from sitting.[215]

On the merits it has been suggested that instead of having the trial judge consider the affidavit of prejudice it could better be considered by the appellate court on application for prohibition or mandamus.[216]

Even though mandamus or prohibition is denied, the trial court must still pass on the affidavit for disqualification.[217]

Where a senior circuit judge designating under section 14 of the Judicial Code a judge to act in the place of one disqualified under section 21 of the Code acts in the exercise of his legitimate jurisdiction, the Supreme Court cannot correct any mistake by a writ of mandamus.[218]

Bias During The Trial

There are many cases recognizing that a judge may become personally biased against a party during the course of the proceedings even though he was not so biased when the proceedings commenced.[219] When such bias appears, the courts have looked to the standards developed under the statute.[220]

> It is not always possible during the trial of a hotly contested case for a judge, however impartial he may be, to maintain in the courtroom that atmosphere of complete judicial calm which is so much to be desired. We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits. . . . Critical re-

210. Schwartz, *supra* note 182, at 428.
211. Connelly v. United States Dist. Ct., 191 F.2d 692 (9th Cir. 1951).
212. Note, 45 Iowa L. Rev. 626, 627 (1960).
213. Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir.), *cert. denied*, 371 U.S. 915 (1962).
214. Schwartz, *supra* note 182, at 424-29; Note, 52 Calif. L. Rev. 1036, 1049 (1964); Note, 45 Iowa L. Rev. 626, 631 (1960); Note, 37 Tex. L. Rev. 928, 931 (1959); Note, 3 Vill. L. Rev. 454 (1959); Note, 65 U.S.L. Rev. 68 (1931); Note, 41 Harv. L. Rev. 78, 82 (1927).
215. Forer, *Psychiatric Evidence in the Recusation of Judges*, 73 Harv. L. Rev. 1325, 1328 (1960).
216. Note, 29 Harv. L. Rev. 430, 431 (1916); *see* United States v. Flegenheimer, 14 F. Supp. 584, 590 (D.N.J. 1935); *see also* Note, 79 Harv. L. Rev. 1435, 1439 (1966).
217. *In re* Greene, 160 F.2d 517 (3d Cir. 1947).
218. *Ex parte* American Steel Barrel Co., 230 U.S. 35, 45 (1913).
219. Note, 44 Minn. L. Rev. 941, 986 n.159 (1960); Note, 79 Harv. L. Rev. 1435 (1966).
220. Knapp v. Kinsey, 232 F.2d 458, 465-66 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956); Blackmone v. United States, 151 A.2d 191 (D.C. Mun. Ct. of App. 1959); Wright v. Mathias, 128 A.2d 658 (D.C. Mun. Ct. of App. 1957).

> marks of the court frequently cut both ways, if they cut at all. Colloquies between counsel and colloquies between the court and counsel as to the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits.[221]

A bias which develops during the trial and is grounded on the evidence is not within the terms of the statute. "But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualified him."[222] A direct verdict was set aside in that case even though it might have been correct.

In one case Judge Learned Hand stated that the trial court may have exhibited indirect bias against the criminal defendant!

> as the jury might have inferred it from the harsh asperity and discourtesy with which he at times addressed counsel. It is difficult to know how far this kind of thing influences a jury; or indeed whether or not the outbursts of petulant irritation, which repeatedly marred the serenity of the courtroom in the case at bar, prejudiced the accused, they were in indignity to counsel which we should not pass in silence, and in which we should have supported them, had they shown less forbearance than in fact they did.[223]

Judge Jerome Frank has stated:

> Taxpayer complains that the judge at the trial showed such impatience with taxpayer when testifying as to indicate prejudice. But most judges, being human, sometimes disclose impatience when witnesses are unduly repetitious or excessively detailed. Such displays of impatience should usually be restrained in the presence of a jury. But, in the absence of a jury, they are not to be taken as signs of improper bias.[224]

In one case the criminal defendant contended that the trial judge indicated to the jury by gesture, inflection, and facial expression, that he did not believe the defendant's claim. The conviction was upheld, the court of appeals stating, "Gestures, inflection and facial expression are not automatically reflected in a reporter's transcript, and an appellate court must rely upon what the record

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221. Goldstein v. United States, 63 F.2d 609, 613 (8th Cir. 1933). *See also* the elaborate discussion by Frank, J., in *In re* Linahan, 138 F.2d 650, 651-54 (2d Cir. 1943).

222. Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941).

223. United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944).

224. Low v. Nunan, 154 F.2d 261, 264 (2d Cir. 1946). *See also* Buckley v. Altheimer, 152 F.2d 502, 511 (7th Cir. 1945).

shows."[225] A court of appeals has stated that the trial court's "tone of voice cannot be reviewed on appeal."[226]

The disqualification statute does not apply to events occuring "after the beginning of the trial."[227] Imposing a heavy sentence does not show bias where the sentence is within the statutory limits. Many events during the trial "relate largely to the exercise of discretion by the court and in themselves alone are not sufficient to show bias and prejudice."

A court has stated:

> When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored.[228]

Where the prejudice occurs during the trial, there can be no change of judge, but only correction on appeal.[229]

225. Vinci v. United States, 159 F.2d 777, 779 (D.C. Cir. 1947).

226. Coupe v. United States, 113 F.2d 145, 149 (D.C. Cir.), *cert. denied*, 310 U.S. 651 (1940). *See also* Peckham v. Ronrico Corp., 288 F.2d 841, 843 (1st Cir. 1961).

227. Calvaresi v. United States, 216 F.2d 891, 900 (10th Cir. 1954).

228. Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir.), *rehearing denied*, 235 F.2d 129, *cert. denied*, 352 U.S. 892 (1956). *See also* Lucas v. United States, 325 F.2d 867, 869 (9th Cir. 1963).

229. Knapp v. Kinsey, 235 F.2d 129 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956).